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| RAYMOND WISHON |) | |
| Claimant |) | |
| VS. |) | |
| |) | Docket No. 203,808 |
| HELENA CHEMICAL COMPANY |) | |
| Respondent |) | |
| AND |) | |
| |) | |
| RELIANCE INSURANCE COMPANY |) | |
| Insurance Carrier |) | |

Respondent requested Appeals Board review of Assistant Director Brad E. Avery's September 11, 1997, Award. The Appeals Board heard oral argument by telephone conference on March 4, 1998.

Claimant appeared by his attorney, Mark E. McFarland of Garden City, Kansas. Respondent and its insurance carrier appeared by their attorney, Jerry M. Ward of Great Bend, Kansas. There were no other appearances.

The Appeals Board has considered the record and has adopted the stipulations listed in the Assistant Director's Award.

The Assistant Director found claimant's work-related injuries had rendered claimant permanently and totally disabled. Although respondent raised nature and extent of disability as an issue in its application for review, it abandoned that issue during oral argument before the Appeals Board.

Claimant commenced receiving social security retirement benefits in January 1996. The respondent contends it is entitled to an offset required by K.S.A. 44-501(h) for those social security retirement benefits. The Assistant Director determined the social security benefits were disability benefits and found the offset required by K.S.A. 44-501(h) did not apply. If the offset does apply, then the issue of whether the offset reduced claimant's workers compensation benefits to less than benefits payable for claimant's functional impairment has to be addressed.

The Assistant Director granted respondent a credit for unearned wages paid claimant in excess of the disability payments entitled to claimant under the workers compensation act as required by K.S.A. 44-510f(b). However, the respondent contends the unearned wage credit is incorrect and should be a higher amount.

In contrast, claimant contends the Assistant Director's Award should be affirmed because the social security retirement benefits claimant is receiving were originally social security disability benefits and, therefore, not entitled to an offset as required by K.S.A. 44-501(h). Claimant also agrees the amount of the unearned wage credit the Assistant Director found was the appropriate credit to apply against the award as required by K.S.A. 44-510f(b).

Accordingly, the three issues before the Appeals Board for determination are:

- (1) Is claimant's permanent total disability award subject to the social security retirement benefit offset as required by K.S.A. 44-501(h)?
- (2) If the offset does apply, does the offset reduce claimant's workers compensation benefit to less than the benefit payable for claimant's functional impairment?
- (3) What is the proper amount of credit to be applied against the award for unearned wages paid in excess of the amount of disability benefits entitled the claimant under the workers compensation act as required by K.S.A. 44-510f(b)?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

- (1) Claimant injured his low back as a result of an automobile accident that occurred during his employment with respondent on May 18, 1994. On the date of the accident, claimant was 63 years of age and was employed by the respondent as an agricultural chemical sales representative. Respondent provided claimant with medical treatment for the low-back injury, and claimant was returned to work on June 3, 1994. At the regular hearing on January 8, 1997, claimant testified he remained symptomatic and continued to

take pain medication for his low-back pain. Also, as recently as October 1996, claimant had seen Jeffrey P. Jenks, M.D., in Colorado Springs for a lumbar facet injection treatment.

Claimant worked for the respondent until March 1, 1995, when he was placed on a disability leave of absence. The respondent terminated claimant on March 1, 1996. At the time of the regular hearing, claimant was 65 years of age, was retired and not employed.

The parties filed a stipulation in this case on March 24, 1997, that contained the following wage and retirement benefit information relevant to the issues on appeal as follows:

- a. From May 18, 1994, to September 1, 1995, or 67.29 weeks, respondent paid claimant his full monthly salary of \$4,274.48 per month or \$986.42 per week, plus fringe benefits.
- b. From August 1, 1995, through December 31, 1995, claimant received social security disability benefits in the total amount of \$6,026.
- c. Commencing January 1, 1996, claimant received social security retirement benefits of \$1,194 per month or \$275.54 per week.
- d. Commencing March 1, 1996, claimant received retirement benefits provided by respondent in the amount of \$296.01 per month or \$68.31 per week.

One of the changes made in the 1993 Workers Compensation Reform Act was the retirement benefit offset required by K.S.A. 44-501(h) which provides as follows:

If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.

As stipulated, commencing March 1, 1996, the respondent provided claimant with a retirement benefit of \$68.31 per week. Claimant made no contribution to this retirement benefit and, therefore, pursuant to K.S.A. 44-501(h), claimant's permanent total weekly disability rate of \$313 is required to be reduced by the \$68.31 per week retirement benefit. Although the claimant argued this offset was not applicable before the Assistant Director,

he did not argue the issue before the Appeals Board. Accordingly, the Appeals Board finds the \$68.31 weekly retirement benefit should be applied effective March 1, 1996, to reduce claimant's permanent total weekly disability rate.

The parties' stipulation indicates claimant received social security disability benefits for the period from August 1, 1995, through December 31, 1995, in the total amount of \$6,026 and commencing January 1, 1996, claimant received social security retirement benefits of \$1,194 per month or \$275.54 per week. Both parties agreed, as of January 1, 1996, claimant's social security disability benefits automatically converted to retirement benefits because claimant turned 65 years of age, the eligibility date for social security old age retirement benefits. See 42 U.S.C.A. § 402(a)(3).

The Assistant Director did not reduce claimant's permanent total weekly benefits by the amount claimant was receiving from social security. The Assistant Director found that social security disability benefits were not included in the language of K.S.A. 44-501(h) and, therefore, respondent was not entitled to an offset. The Assistant Director cited the Appeals Board decision in Gadberry v. R.L. Polk & Company, Docket No. 193,516 (July 96) in support of that finding. In Gadberry, the Appeals Board found the language of K.S.A. 44-501(h) allows a reduction for social security retirement benefits but does not allow a reduction for social security disability benefits.

The claimant agrees with the Assistant Director's finding and argues the reason claimant retired was not because of his age but was because of his disability. Although claimant started receiving social security retirement benefits on January 1, 1996, those benefits were only a change in identification of the benefits. Accordingly, the claimant asserts the benefits remain disability benefits not subject to the offset requirement of K.S.A. 44-501(h). Furthermore, claimant argues the only reason claimant retired at the age of 65 was because of his accident. Claimant testified if he had not had the accident he would have worked until he was 70 years of age. Consequently, claimant asserts he did not retire voluntarily; he was forced to retire because of his work-related accident. Claimant argues the retirement offset contained in K.S.A. 44-501(h) only applies where a worker is capable of continuing to work and chooses voluntary retirement. The statute does not apply, as in this case, where the worker is forced to retire because of his disability.

The Appeals Board finds the Assistant Director's reliance on the Gadberry case is correct in that the Appeals Board found an employee's workers compensation disability benefits are not required to be reduced by social security disability benefits. K.S.A. 44-501(h) only requires a reduction when claimant is receiving retirement benefits. Accordingly, no reduction is appropriate for the \$6,026 claimant received in social security disability benefits for the period from August 1, 1995, through December 31, 1995.

However, the Appeals Board finds, for the period commencing January 1, 1996, respondent is entitled to a reduction in the amount of \$275.54 per week for the social security retirement benefits. The Appeals Board finds the K.S.A. 44-501(h) language is clear and unambiguous and requires an injured employee's weekly disability benefits

payable under the workers compensation act to be reduced by the weekly equivalent amount of social security retirement benefits. Furthermore, the Appeals Board finds it is not relevant whether claimant received social security disability benefits before he reached the eligibility age for old age retirement benefits. The Appeals Board finds the fact the social security benefits changed from disability to retirement does not negate the clear meaning of the statute which requires a reduction in workers compensation disability benefits at the time claimant starts receiving social security retirement benefits.

Therefore, the Appeals Board concludes claimant's permanent total weekly compensation rate of \$313 should be reduced by claimant's weekly social security retirement benefit of \$275.54 per week beginning January 1, 1996, resulting in a reduced permanent total weekly compensation rate of \$37.46. Then on March 1, 1996, the reduced weekly compensation rate of \$37.46 is further reduced to zero when the respondent's retirement weekly benefit of \$68.31 is applied.

(2) The respondent argues claimant is entitled to an award of temporary partial disability compensation of \$313 per week for the period claimant worked after his accident from June 3, 1994, until March 1, 1995. Respondent claims claimant worked only part-time during that period. Therefore, respondent asserts claimant is entitled to an award for temporary partial disability based on claimant's maximum compensation rate of \$313 per week. Respondent reasons if claimant only worked half-time, he would be entitled to temporary partial weekly compensation disability computed on $66\frac{2}{3}$ percent of the difference between claimant's \$986.42 pre-injury average weekly wage and \$493.21 post-injury half-time wage or \$328.82 which is subject to claimant's maximum weekly compensation rate of \$313.

The Appeals Board finds the record does not contain the appropriate evidence to determine claimant's entitlement to temporary partial disability weekly compensation. Claimant was employed by the respondent as a salary employee who testified he worked, before his accident, anywhere from 8 hours per day to 12 or 15 hours per day. The Appeals Board also acknowledges claimant testified he was only able to work 2 to 3 hours per day after his accident. However, the Appeals Board finds, since claimant was a salaried employee, the record does not contain evidence of whether or not claimant, although working only 2 to 3 hours or 4 hours per day, did not earn his full salary during the period in question. Therefore, the Appeals Board finds claimant was earning full wages while working from June 3, 1994, through March 1, 1995.

The parties stipulated claimant's work-related injury resulted in a whole-body permanent function impairment of 11 percent. Therefore, for the period of June 3, 1994, through March 1, 1995, claimant was entitled to permanent partial disability benefits based on the 11 percent permanent functional rating. See K.S.A. 44-510e. Thereafter, for the period of March 2, 1995, through December 31, 1995, the Appeals Board concludes claimant was not working and was on a leave of absence and was entitled to permanent total disability benefits in the amount of \$313 per week.

K.S.A. 44-501(h) provides that an employee's workers compensation benefits reduced by retirement benefits shall not be less than the workers compensation benefits payable for the employee's percentage of functional impairment. In this case, claimant's functional disability impairment benefit would amount to 45.65 weeks at \$313 per week. Claimant's award, however, calculates to more than the 11 percent permanent functional impairment rating. Claimant's award entitles him to 38.86 weeks of permanent partial disability compensation for the 11 percent functional impairment and 43.57 weeks of permanent total disability compensation at \$313 per week and an additional 8.43 weeks of permanent total disability compensation at the reduced rate of \$37.46 per week.

(3) The parties' stipulation indicates respondent paid claimant his full salary of \$986.42 per week from claimant's date of accident of May 18, 1994, through September 1, 1995, or 67.29 weeks for a total amount of \$66,376.20. Respondent argues it is entitled to a credit against claimant's award for unearned wages it voluntarily paid claimant in excess of the amount of disability benefits claimant was entitled to under the workers compensation act. See K.S.A. 44-510f(b).

The Assistant Director adopted claimant's calculation for the overpayment credit in the amount of \$19,168.76. Claimant alleged he was overpaid \$1,659.84 for the period from May 18, 1994, through June 2, 1994, and \$17,508.92 for the period from March 2, 1995, through September 1, 1995. Claimant asserts no overpayment credit was due for the period claimant worked from June 3, 1994, through March 1, 1995, because claimant earned full wages. On the other hand, the respondent asserts the overpayment credit is also due for this period as claimant was entitled to temporary partial disability benefits.

The Appeals Board finds both of the parties overpayment credit calculations are flawed. The Appeals Board concludes the respondent is entitled to a credit against the award for the full salary paid claimant for a total of 28.43 weeks at \$986.42 per week or \$28,043.92. This 28.43 week period consist of 2.14 weeks of temporary total disability awarded for the time claimant missed work from May 18, 1994, through June 2, 1994, and 26.29 weeks from March 2, 1995, through September 1, 1995, when respondent paid claimant full salary while on a disability leave of absence. As previously noted, for the period of June 3, 1994, through March 1, 1995, or 38.86 weeks, no credit is due because claimant was employed and earned full wages. The Appeals Board finds claimant's total award amounts to \$26,786.20 and the total wages paid claimant that are subject to the unearned wage credit is \$28,043.92. Thus, there is an unearned wage credit in excess of the total award in the amount of \$1,257.72.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Assistant Director Brad E. Avery's September 11, 1997, Award should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Raymond Wishon, and against the respondent, Helena Chemical Company, and its insurance carrier, Reliance Insurance Company, for an accidental injury which occurred on May 18, 1994, and based upon an average weekly wage of \$986.42.

Claimant is entitled to 2.14 weeks of temporary total disability compensation at the rate of \$313 per week or \$669.82, followed by 38.86 weeks of permanent partial general disability at the rate of \$313 per week or \$12,163.18 for a 11% permanent partial general disability, followed by 43.57 weeks of permanent total disability at the rate of \$313 per week or \$13,637.41, followed by 8.43 weeks of permanent total disability at the reduced rate of \$37.46 per week or \$315.79, making a total award of \$26,786.20.

The respondent voluntarily paid claimant full wages in the amount of \$28,043.92 and is entitled to a credit for this payment against the total award of \$26,786.20. Therefore, respondent has overpaid the award in the amount of \$1,257.72.

All other orders contained in the Assistant Director's Award that are not inconsistent with this order are adopted by the Appeals Board as if specifically set forth herein.

IT IS SO ORDERED.

Dated this ____ day of May 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Mark E. McFarland, Garden City, KS
Jerry M. Ward, Great Bend, KS
Brad E. Avery, Assistant Director
Administrative Law Judge, Garden City, KS
Philip S. Harness, Director